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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1978

78-1915
No. _____

YAFFE IRON & METAL CORPORATION

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT**

SAMUEL D. GOODKIN

Attorney for Petitioner

711 First National Bank Building

Fort Smith, Arkansas 72901

(501) 783-6821

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TO THE HONORABLE, THE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE SU-
PREME COURT OF THE UNITED STATES.

The Petitioner, Yaffe Iron and Metal Corporation,
prays that a writ of certiorari issue to review the judg-
ment and opinion entered March 12, 1979, by the United
States Court of Appeals for the Eighth Circuit, affirm-

ing a judgment of the District Court for the Western District of Arkansas which held:

1. that 26 USC § 1563 rendered Petitioner and another corporation members of a controlled group even though their respective stockholders did not own identical stock in each corporation, and the Statute plainly requires that such ownership be identical.

OPINIONS BELOW

The Opinion by the United States Court of Appeals for the Eighth Circuit is set forth in the Appendix as Exhibit "A" and is reported in 593 *Fed. 2nd* 832.

The Opinion by the United States District Court Judge for the Western District of Arkansas is set forth in the Appendix as Exhibit "B" and is reported in 78-1 U.S. Tax Cas. Par. 9314 (W.D. Ark. 1978).

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254 (1).

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Eighth Circuit on April 12, 1979.

A Petition for Rehearing was timely filed and denied on April 9, 1979.

UNITED STATES STATUTES IN ISSUE

26 USC 1563(a)(2) defines a brother-sister controlled group as:

Two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own (within the meaning of subsection (d)(2) stock possessing —

(A) at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock of each corporation, and

(B) more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, *taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.*¹

26 U.S.C. 1563(d)(2) defines a brother-sister controlled group as follows:

For purposes of determining whether a corporation is a member of a brother-sister controlled group of corporations (within the meaning of subsection (a)(2)), stock owned by a person who is an individual, estate, or trust means —

- (A) stock owned directly by such person, and
- (B) stock owned with the application of subsection (e).

(e) Constructive ownership.

- (1) Options . . .
- (2) Attribution from partnerships . . .
- (3) Attribution from estates or trusts . . .
- (4) Attribution from corporations . . .
- (5) Spouse . . .
- (6) Children, grandchildren, parents, and grandparents . . .

¹ Emphasis here, and throughout petition, supplied.

QUESTION PRESENTED

1. May stock artificially attributed from one corporation be added to personally owned stock in another corporation in order to satisfy the 50 percent test under 26 USC 1563(a)(2)(B), which requires that the stock ownership be identical as to each corporation?

STATEMENT OF THE CASE

Petitioner Yaffe Iron & Metal Corporation is an Arkansas corporation chartered in 1956, located in Fort Smith, Arkansas, and will hereafter be referred to as the "Fort Smith Corporation". Its stock is owned as follows:

Robert Yaffe	32.50%
Richard Yaffe	30.00%
Yaffe Iron and Metal Company, Inc.	37.50%
Total	100.00%

The Yaffe Iron and Metal Company, Inc., is an Oklahoma corporation chartered in 1962, located in Muskogee, Oklahoma, and will hereafter be referred to as the "Muskogee Corporation". Its stock is owned as follows:

Robert Yaffe	51%
Richard Yaffe	0%
Others (not herein material)	49%
Total	100%

In 1971 and 1972 a corporation was entitled to a surtax exemption of \$25,000.00 on its income tax return, which meant that it paid 22% on the first \$25,000.00 and 48% on the balance. Each corporation filed its separate income tax return for said years, and each claimed a surtax exemption of \$25,000.00, as it always

had done in prior years. The Internal Revenue Service, however, disallowed a full surtax exemption for each corporation and required the two corporations to claim an exemption of only \$12,500.00 each.² The corporations did so under protest, paid the additional taxes, and filed suit in the District Court for a refund. The District Court and the Court of Appeals denied the refund.

The Government's contention is based upon what we respectfully submit is an erroneous interpretation and application of Section 26 USC 1563, which defines a brother-sister corporation as set out supra, pages 2 & 3. Under 26 U.S.C. 1563, if two corporations are a controlled group, they are entitled to only one surtax exemption between them; and in order to constitute a controlled group, or a brother-sister corporation, they must meet two tests — an 80% test and a 50% test.

The 80% test requires five or fewer persons, who are individuals, estates, or trusts, to own directly or constructively, at least 80% of the total stock in each corporation, but does not require that the ownership in each corporation be identical.

The 50% test, on the other hand, provides that the same people, in addition to owning a total of 80%, also own more than 50% of stock in each corporation, *and requires further that such stock ownership be identical with respect to each corporation.* In other words, if a stockholder personally owns 60% common stock in corporation A and 40% common stock in corporation B, his identical ownership is 40% common stock in each corporation, or limited to the lesser of the two. Similarly, if he owns 51% common stock in corpora-

² The concept of splitting exemptions is still being erroneously applied by the IRS, and will cost this taxpayer and others similarly situated millions of dollars.

tion A and 51% *preferred* stock in corporation B, his identical ownership in each corporation is 0% because common and preferred stock are not identical. Likewise, if he personally owns in his own right 51% in corporation A, but has merely constructive ownership of 51% in corporation B, his identical ownership in each corporation is 0%, because personally owned stock is obviously not identical to constructively owned stock.

Accordingly, since Robert Yaffe is the only stockholder who personally owns more than 50% of stock in the Muskogee corporation, he is the only pivotal stockholder to be considered in applying the 50% test. Consequently, since he personally owns 51% in the Muskogee corporation and only 32.50% in the Fort Smith corporation, his identical ownership in each corporation is only 32.50%, and the 50% test fails. And since both tests are required to constitute a controlled group, each corporation is entitled to a full surtax exemption, and the decision of the Appeals Court should be reversed.

The Government, however, maintains in essence that the word "identical" should be disregarded. It argues that since the Muskogee corporation owns 37.50% in the Fort Smith corporation, and since Robert Yaffe owns 51% of the Muskogee corporation that, therefore, under the rules of constructive ownership, or attribution (26 USC 1563(d)(2)), Robert would own 51% of the 37.50%, or approximately an additional 19% by attribution; and when this 19% is added to his personally owned 32.50% in the Fort Smith corporation, he would become the owner of 51% in the Fort Smith corporation, and thus satisfy the 50% test.

The fallacy with this argument is that it mixes personally owned stock with artificially attributed stock, contrary to the plain requirement of the Statute that

the ownership of stock in each corporation be identical. The word "identical" is defined by Black's Law Dictionary as follows:

"IDENTICAL. Exactly the same for all practical purposes. *Carn v. Moore*. 74 Fla. 77, 76 So. 337, 340" *Black's Law Dictionary*, Rev. 4th Ed., page 880.

We respectfully submit that constructively owned stock is in no way identical to personally owned stock. For example, personally owned stock can be sold or hypothecated by its owner, or subjected to attachment under execution for his debts, but attributed or constructively owned stock obviously cannot.

It is significant that the 80% test does not require the ownership to be identical; whereas, the 50% test plainly and obviously does. The reason for this is that Congress intended to limit the application of the controlled group rule to cases where at least slightly more than 50% of the stock ownership is clearly identical. Otherwise, there would be no point in requiring both an 80% and a 50% test, as the 80% already includes more than 50%.

Identical ownership, being exactly the same for *all practical* purposes, must mean that it is exactly the same as to quality, purpose, and character; and constructively owned stock is simply not identical to personally owned stock for such practical purposes.

It should be noted, also, that attribution applies not only from corporations, but from spouses, children, grandchildren, parents, grandparents, estates, and trusts as well.³ It is not too difficult to see, therefore, that by disregarding the requirement of identical ownership, many, many corporations would find themselves

³ 26 USC 1563(d)(2)(e), *supra*, page 3.

in violation of the law by claiming a full surtax exemption, unless they required each stockholder to furnish the names of all his children, grandchildren, parents, spouse, and a list of the trusts, estates, or other corporations in which he has an interest, in order to determine whether under the rules of attribution, or constructive ownership, he would be the owner of more than 50% of its stock, and thus limit the surtax exemption. Each corporation would also have to contact every other corporation in order to agree among them how to split the surtax exemption. We respectfully submit that Congress had no intention of creating such chaos. The requirement of identical ownership means just that — exactly alike for all practical purposes.

We anticipate the Government will argue that constructively owned stock should be treated as actually owned stock. Nevertheless, even if it is so treated, the fact remains that actually owned attributed stock is not the same as personally owned stock, just as actually owned common stock is not the same as actually owned preferred stock. Furthermore, by manifestly using the word "identical" in the Statute, the meaning of which is exact and clear cut, *it preempts any other contrary or artificial definition.*

REASONS FOR GRANTING THE WRIT

1. The Appeals Court has adversely decided a Federal question of great substance which has not heretofore been determined by this Court or by any other Appeals Court.

2. Thousands of individuals own stock in several corporations, and the stock ownership may change daily. In order to determine how much of a surtax exemption each corporation should claim, it would be necessary for each corporation to obtain from each of its stockholders the names of his spouse, children, grandchildren, parents, grandparents, and the names of all estates, trusts, and corporations in which he owns an interest. This is chaotic.

3. Thousands of stockholders will suffer financially because their corporations will not be allowed a full surtax exemption.

4. Since the Statute expressly requires identical ownership, which means exactly the same for all practical purposes, it necessarily preempts every other constructive or contrary definition.

5. If Congress had not intended for the 50% ownership to be identical, in the true sense of the word, it would not have required both an 80% ownership and a 50% ownership. It appears, therefore, that the plain meaning of a Federal Statute has been disregarded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL D. GOODKIN

Attorney for Petitioner

711 First National Bank Building
Fort Smith, Arkansas 72901
(501) 783-6821

APPENDIX**Exhibit A**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

YAFFE IRON & METAL CORPORATION
Plaintiff,

V. No. FS-75-16-C

UNITED STATES OF AMERICA
Defendant.

MEMORANDUM OPINION

This is a tax refund action in which Yaffe Iron and Metal Corporation (hereafter Yaffe-Fort Smith) seeks to recover \$7,160.24 which is paid under protest on October 16, 1974. The sole question is whether Yaffe-Fort Smith is entitled to the \$25,000.00 exemption from the corporate surtax allowed by 26 U.S.C. § 11(d) or whether Yaffe-Fort Smith must share the \$25,000.00 exemption with another corporation.

Trial to the Court occurred on January 5, 1977. The parties stipulated that all affidavits, exhibits and previous stipulations of facts filed in conjunction with their pleadings and motions for summary judgment, would be considered evidence in the case. Robert Yaffe testified personally. At the conclusion of the evidence, both parties stated they had no further evidence to introduce.

26 U.S.C. § 11(d) grants each corporation a surtax exemption but recognizes that if two or more corporations are closely held and controlled by the same individuals, fairness requires the corporations to share the

exemption. The rules for determining how and when certain closely held corporations must share the surtax exemption are set out in 26 U.S.C. § 1563.

26 U.S.C. § 1563 defines a "controlled group of corporations" who must share the 11(d) surtax exemption as including a brother-sister controlled group, as well as a parent-subsidiary controlled group. In the case at bar, the United States contends that the plaintiff, Yaffe-Fort Smith, is a sibling-corporation with Yaffe-Muskogee.

26 U.S.C. § 1563(a)(2) provides as follows:

Brother-sister Controlled Group. Two or more corporations if 5 or fewer persons who are individuals, estates or trusts own (within the meaning of subsection (d)(2) stock possessing —

(A) at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock of each corporation, and

(B) more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.

26 U.S.C. § 1563(d)(2) provides rules for determining stock ownership to include both stock owned directly by an individual and stock owned indirectly through a corporation.

A relevant facts as stipulated by the parties and as introduced into evidence at trial to the Court can be summarized. Yaffe-Fort Smith is an Arkansas corporation whose stock is all common stock of equal value owned by three entities. Yaffe-Muskogee is an Oklahoma corporation whose stock is all of equal value and

is owned by five entities. The stock of each corporation is directly owned as follows:

<i>Owner</i>	<i>Yaffe-Fort Smith</i>	<i>Yaffe-Muskogee</i>
Richard Yaffe	30%	51%
Robert Yaffe	32.5%	
Yaffe-Muskogee	37.5%	
Steve Yaffe		20%
Rose Yaffe		13%
Eleanor Nordhauser		8%
Linda Cabat		8%
	<hr/> 100%	<hr/> 100%

Applying the rules of attribution required by subsection (d)(2) the constructive stock ownership of Yaffe-Fort Smith and Yaffe-Muskogee is as follows:

<i>Owner</i>	<i>Yaffe-Fort Smith</i>	<i>Yaffe-Muskogee</i>
Richard Yaffe	30%	
Robert Yaffe	51.625%	51%
Steve Yaffe	7.5%	20%
Rose Yaffe	4.875%	13%
Eleanor Nordhauser	3%	8%
Linda Cabat	3%	8%
	<hr/> 100%	<hr/> 100%

The plaintiff-taxpayer ignores the rules of attribution required by subsection (d)(2) and argues that it does not constitute a member of a controlled group because 1) at least 80 percent of its stock is not owned by five or fewer persons who are individuals, estates, or trusts; and 2) no one individual controls more than 50 percent of its entire stock-voting privileges.

In the case at bar, Robert Yaffe directly owns 32.5% of Yaffe-Fort Smith. Robert also directly owns 51% of Yaffe-Muskogee and Yaffe-Muskogee owns 37.5% of Yaffe-Fort Smith. Under 26 U.S.C. § 1563(d)(2) and (e)(4) Robert is deemed to own 51.625% of the

stock of Yaffe-Fort Smith. Since Robert Yaffe is an individual who owns 51.625% of the plaintiff's stock and Richard Yaffe is an individual who owns 30% of the plaintiff's stock, the plaintiff is a corporation having 81.625% of its total stock owned by two individuals. The parties have stipulated that each share of stock has the same value as any other share, and therefore more than 80% of the total value of all the stock is concentrated in two individuals. It is uncontested that Yaffe-Muskogee is directly and totally owned by 5 individuals. It therefore appears that the ownership requirement of the 80% test is satisfied.

The recent case of *T. L. Hunt, Inc. of Tex. v. Commissioner*, 562 F.2d 532 (8th Cir. 1977) held that the same individuals need not own 80% of both corporations for § 1563(a)(2)(A) to be satisfied. Since Richard Yaffe does not own any shares of Yaffe-Muskogee, we have relied on *T. L. Hunt* to determine that Richard's shares should be added to those of Robert to determine that the 80% test is satisfied.

The 80% test is also satisfied if 5 or fewer individuals own 80% of the total combined voting power of all classes of stock entitled to vote. There was a stock voting agreement between Robert and Richard Yaffe concerning the plaintiff, Yaffe-Fort Smith. The effect of the agreement was to vest in two individuals, Robert and Richard, over 80% of the total combined voting power of all classes of stock entitled to vote. Therefore, under both the value test and the voting test the 80% requirement of § 1563(a)(2) is satisfied.

To be a "brother-sister controlled group" within § 1563(a)(2), the corporations must satisfy both the 80% test and the 50% test. The plaintiff contends it does not meet the 50% requirement due to a voting agreement between Richard and Robert whereby each

would equally share all voting rights of all outstanding stock regardless of the ownership of the stock. The 50% test is as follows:

Two or more corporations if 5 or fewer persons who are individuals . . . own (within the meaning of subsection (d)(2)) stock possessing —

(B) more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each person only to the extent such stock ownership is identical with respect to each such corporation.

As recognized in *T. L. Hunt, Inc. v. C.I.R.*, 562 F.2d 532, 535 (8th Cir. 1977), the 50% test differs from the 80% test in an important regard: Under the 80% test the same five individuals need not own 80% of each corporation; under the 50% test (§ 1523(a)(2)(B)) the same five or fewer individuals must own or control over 50% of the stock of each corporation constituting the control group.

In the case at bar, Robert Yaffe is the only individual who directly owns shares in both corporations. Applying the rules of attribution required by § 1563(d)(2), Robert owns 51.625% of the total value of shares of all classes of stock of Yaffe-Fort Smith and 51% of the total value of shares of all classes of stock of Yaffe-Muskogee. 26 U.S.C. § 1563(a)(2)(B) is therefore satisfied.

Plaintiff has proved and this court finds that there was a voting agreement between Robert and Richard Yaffe concerning the plaintiff-corporation whereby neither would exercise over 50% of the total outstanding stock voting rights. Plaintiff argues that due to the agreement, Robert did not own stock possessing

"more than 50 percent of the total combined voting power of all classes of stock entitled to vote" and therefore, the 50% test was not satisfied.

As can readily be seen, the 50% test is in the disjunctive and is satisfied either by control of the voting power or by ownership of more than 50% of the total value of all classes of stock of each corporation. In the case at bar it has been stipulated that all shares of stock in Yaffe-Fort Smith are of equal value and that all shares in Yaffe-Muskogee are also of equal value. Applying the rules of attribution required by § 1563(d)(2), Robert Yaffe owns over 50% of the total value of all shares of all classes of stock in Yaffe-Fort Smith and Yaffe-Muskogee. The "value" phrase of § 1563(a)(2)(B) is therefore satisfied.

The plaintiff argues that even though the 50% test is phrased in the disjunctive, we should only look to the voting-rights aspect of the test. Plaintiff relies on language in *T. L. Hunt, Inc., of Texas v. Commissioner*, 562 F.2d 532, 535 (8th Cir. 1977) to the effect that "§ 1563(a)(2)(A) is a financial interest test, while § 1563(a)(2)(B) is a control test."

We decline to ignore the ownership-value test found in § 1563(a)(2)(B) on the basis of the above-quoted dicta. Though the regulations (26 C.F.R. § 1563(a)(6)) recognize the validity and agreements concerning the voting rights of stock, the statute recognizes that despite voting agreements, control of a corporation also follows ownership. To this extent the language of *T. L. Hunt* will be followed. We decline to infer that the Court of Appeals for the Eighth Circuit meant that the 50% test could only be satisfied by regarding stock voting rights.

The plaintiff next contends that 26 U.S.C. § 1563 is

unconstitutional in that it unreasonably discriminates against corporations which were not formed for the purpose of obtaining an additional surtax exemption. We find the classification made by Congress in 26 U.S.C. § 1563 to be a reasonable method of distinguishing those corporations which are so closely held that they should be made to share the corporate surtax exemption. It clearly is not so arbitrary a classification as to have no relation to the special benefits derived by a particular group as to violate the due process clause of the Fifth Amendment. See *Brushaber v. Union Pacific R.R.*, 240 U. S. 1, 25-26 (1915).

The Clerk will prepare a judgment for the defendant in accord with this opinion.

Dated: This 3 day of March, 1978.

(s) Paul X Williams
Paul X Williams

APPENDIX**Exhibit B**

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

YAFFE IRON & METAL CORPORATION

vs. Civil Action No. FS-75-16-C

UNITED STATES OF AMERICA

JUDGMENT

Pursuant to the Court's Memorandum Opinion filed this date and in accordance therewith,

IT IS ORDERED AND ADJUDGED that the above-styled cause be, and it is hereby, dismissed with prejudice.

This the 3rd day of March, 1978.

(s) Paul X Williams

UNITED STATES DISTRICT JUDGE

APPENDIX**Exhibit C**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1389

Yaffe Iron & Metal
Corporation,

Appellant,

v.

United States of America,

Appellee.

* Appeal from the United
* States District Court for
* the Western District of
* Arkansas

Submitted: November 17, 1978

Filed: March 12, 1979

Before LAY and HEANEY, Circuit Judges, and

HANSON,* Senior District Judge.

PER CURIAM.

* The Honorable William C. Hanson, United States Senior District Judge for the Southern District of Iowa, sitting by designation.

Yaffe Iron & Metal Corporation ("Yaffe-Fort Smith"), an Arkansas corporation located in Fort Smith, Arkansas, appeals from the dismissal of its complaint seeking a refund of income taxes. Its principal contention is that the Commissioner of Internal

Revenue erroneously determined that it and Yaffe Iron & Metal Company, Inc., ("Yaffe-Muskogee")¹ were members of a "brother-sister controlled group" and, as such, were each entitled to merely a proportionate share of the group's surtax exemption rather than the full exemption each would otherwise be entitled to. We affirm the judgment of the district court.²

The relevant facts are undisputed. For the years 1971 and 1972, Yaffe-Fort Smith and Yaffe-Muskogee each claimed a full surtax exemption of \$25,000.00 under 26 U.S.C. § 11(d). The Commissioner, finding that the two Yaffe corporations constituted a brother-sister controlled group, disallowed half of the exemption for each corporation. Yaffe-Fort Smith thereupon paid under protest its resulting tax bill, amounting to \$7,160.24, and filed the instant action to obtain a refund.

Under 26 U.S.C. § 1561, the component members of a controlled group of corporations are limited to a single \$25,000 surtax exemption, divided equally among the component members or apportioned as the component members may agree. A "brother-sister controlled group" is defined in 26 U.S.C. § 1563(a)(2) as:

Two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own (within the meaning of subsection (d)(2)) stock possessing —

(A) at least 80 percent of the total combined

¹ Yaffe Iron & Metal Company, Inc. ("Yaffe-Muskogee") is an Oklahoma corporation located in Muskogee, Oklahoma.

² The Honorable Paul X Williams, Chief Judge, Western District of Arkansas.

voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock of each corporation, and

(B) more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.

Under subsection (d)(2), stock owned by a person includes both stock owned directly by that person and stock owned indirectly through a corporation. *See* 26 U.S.S. § 1563(e)(4).³

The 80% and 50% tests delineated in the statute perform two distinct functions in defining brother-sister controlled groups. The former limits the applicability of § 1563(a)(2) to instances in which nearly all of the stock of each corporation in the corporate group is owned by five or fewer persons. The latter test, by taking into account stock ownership only to the extent any given person owns identical amounts of stock in each of the various group corporations, further limits the sweep of § 1563(a)(2) to situations in which the same small group of individuals has control of each corporation in the group as defined by majority voting power or common ownership. This Court has previously observed that "§ 1563(a)(2)(A) is a financial

³ 26 U.S.C. § 1563(e)(4) reads as follows:

Stock owned, directly or indirectly, by or for a corporation shall be considered as owned by any person who owns . . . 5 percent or more in value of its stock in that proportion which the stock which such person so owns bears to the value of the stock in such corporation.

interest test, while § 1563(a)(2)(B) is a control test.” *T. L. Hunt, Inc. v. Commissioner of Internal Revenue*, 562 F.2d 532, 535 8th Cir. 1977).

The application of § 1563 to the corporations at issue here turns on an examination of the total value of shares owned rather than the voting power held by owners of stock. Further, in view of the fact that a portion of Yaffe-Fort Smith was owned by Yaffe-Muskogee, the attribution rules of 26 U.S.C. §§ 1563(d)(2), (e)(4) are implicated. Under these circumstances, the determination of controlled group status involves three steps: (1) determination of the ownership of the two corporations; (2) adjustment of ownership through application of the attribution provisions to the Yaffe-Fort Smith stock owned by Yaffe-Muskogee; and (3) application of the 80% and 50% tests to the revised ownership percentages thus established.

Owner	Yaffe-Fort Smith	Yaffe-Muskogee
Richard Yaffe	30.0%	—
Robert Yaffe	32.5%	51%
Yaffe-Muskogee	37.5%	—
Steve Yaffe	—	20%
Rose Yaffe	—	13%
Eleanor Nordhauser	—	8%
Linda Cabat	—	—
	<u>100%</u>	<u>100%</u>

Following the provisions of 26 U.S.C. § 1563(e)(4), the Commissioner attributed to the shareholders of Yaffe-Muskogee the 37.5% interest held by that corporation in Yaffe-Fort Smith. The resulting ownership figures for Yaffe-Fort Smith are as follows:

Shareholder	Owned Directly	Percentage Attributed From Yaffe-Muskogee	Total
Richard Yaffe	30.0%	—0—	30.000%
Robert Yaffe	32.5%	19.125% (37.5% x 51%)	51.625%
Steve Yaffe	—0—	7.500% (37.5% x 20%)	7.500%
Rose Yaffe	—0—	4.875% (37.5% x 13%)	4.875%
Eleanor Nordhauser	—0—	3.000% (37.5% x 8%)	3.000%
Linda Cabat	—0—	3.000% (37.5% x 8%)	3.000%
TOTAL			<u>100.000%</u>

Finally, using these revised ownership figures, the Commissioner determined that the two corporations formed a brother-sister controlled group, for, as the following chart shows, they satisfied both the 80% test and the 50% test set forth in 26 U.S.C. § 1563(a)(2).

Shareholder	80% Test § 1563(a) (2)(A)	50% Test § 1563(a) (2)(B)
	Yaffe-Fort Smith	Yaffe-Muskogee
Richard Yaffe	30.000%	—0—
Robert Yaffe	51.625%	51.000%
Steve Yaffe	7.500%	7.500%
Rose Yaffe	4.875%	4.875%
Eleanor Nordhauser	3.000%	3.000%
TOTAL	<u>97.000%</u>	<u>66.375%</u>

The district court agreed with the Commissioner and dismissed Yaffe-Fort Smith's refund action. *Yaffe Iron & Metal Corporation v. United States*, 78-1 U.S. Tax Cas. ¶ 9314 (W.D. Ark. 1978).

On appeal, Yaffe-Fort Smith presents numerous arguments as to why it should not be deemed a member of a brother-sister controlled group. First, it contends that the 37.5 interest in it owned by Yaffe-Muskogee should not have been attributed to the latter's shareholders. Noting that 26 U.S.C. and 1563(a)(2) speaks

only of stock owned by "individuals, estates, or trusts", appellant argues that stock owned by corporations is excluded from consideration. This argument ignores the clear language of 26 U.S.C. § 1563(e)(4), *see* n.3, *supra*, which authorizes the attribution of stock held by corporations.

Equally without merit is appellant's contention that, in determining the amount of "identical" ownership for the purposes of the 50% test in 26 U.S.C. § 1563(a)(2)(B), the district court erred in equating directly-owned stock with constructively-owned stock. The statute specifically requires that stock constructively owned by a person be treated as actually owned by that person. 26 U.S.C. § 1563(f)(2)(A).

Next, appellant argues that the 50% test was not satisfied because five shareholders did not control more than 50% of the total combined voting power of the stock of each corporation. The Government concedes that, as a result of an agreement by Richard and Robert Yaffe to share voting power in Yaffe-Fort Smith 50-50, the voting power part of the 50% test was not fulfilled. Nonetheless, the 50% test contains two alternative standards, one predicated on voting power and the other on total value, either of which may be invoked. The total value standard was satisfied in this case, for Robert Yaffe alone owned more than 50% of the total value of the shares of each corporation.

In arguing that there was no common control of the corporations, appellant relies on a contextually unwarranted construction of our reference in *T. L. Hunt, Inc. v. Commissioner of Internal Revenue*, *supra* to the 50% test as a "control test." We obviously did not mean to imply by that reference that voting power was the sole measure of control in contradiction to the plain language of the statute. As we have noted *supra*, the

statute makes common ownership of equal significance in applying the so-called "control test." The key function distinction between the 80% test and the 50% test is not that the former is concerned with ownership and the latter voting power, but that the former does not contain the latter's requirement that each person whose holdings are considered in applying the test must own stock in each of the controlled corporations. *Id.* at 535.

Appellant's next argument is that § 1563 is inapplicable because there was no showing that it engaged in tax avoidance. We disagree. Whereas other statutory attempts to curb abuses concerning multiple surtax exemptions require a showing of tax avoidance, § 1563 contains a mechanical test that was satisfied in this case. *See Fairfax Auto Parts of Northern Virginia, Inc. v. Commissioner of Internal Revenue*, 65 T.C. 798, 812-13 (1976) (dissent), *rev'd*, 548 F.2d 501 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977).

Next, appellant attacks a mechanical application of § 1563 as unconstitutional in that it unreasonably discriminates against corporations that were not formed for the purpose of obtaining an additional surtax exemption. The district court properly rejected this argument, for the classification made by Congress in § 1563 is a reasonable method of ensuring that the surtax exemption will not be abused by "enterprises which use, or might choose to use, the multiple corporate form of organization." H.R.Rep. No. 749, 88th Cong., 2nd Sess. 117, *reprinted in* [1964] U.S. Code Cong. & Ad. News 1426; *See United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970).

Finally, appellant argues § 1563 is unconstitutional as an *ex post facto* law because, when it was enacted in 1964, it penalized the two Yaffe corporations for their

relatedness, which predated 1964 and yet had evoked no penalty prior to the enactment of § 1563. The *ex post facto* clause, however, is inapplicable because it extends only to criminal statutes. *Galvan v. Press*, 347 U.S. 522, 531 (1954); *United States v. Hopkins*, 529 F.2d 775, 777 (8th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977).

Accordingly, we affirm the judgment dismissing the complaint.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX

Exhibit D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 78-1389.

September Term, 1978

Yaffe Iron & Metal)
Corporation,)

Appellant,) Appeal from the United
States District Court for
vs.) the Western District of
Arkansas.

United States of America,)
Appellee.)

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

April 9, 1979